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Fred Meyer Stores, Inc. and United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union. Case 19–CA–32171

January 4, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on October 16, 2009, the General Counsel issued the complaint on November 2, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 19-RC-15036. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On November 17, 2009, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On November 19, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The General Counsel filed a reply to the Respondent's response.

Ruling on Motion for Summary Judgment¹

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its argument that the two-member Board lacked the statutory authority to issue its Order denying the Respondent's request for review of the Regional Director's decision and direction of election in the underlying representation proceeding.²

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Teamsters Local 523 v. NLRB*, ___ F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009). But see *Laurel Bay Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

² The Respondent asserts in its response that it could not have previously raised its objection to the Board's authority to issue a decision in the representation proceeding, and that therefore the issue is properly raised at this time and can be litigated in this unfair labor practice proceeding. The Respondent further states that it intends to preserve the arguments it raised in the representation proceeding until the status of the two-member Board is conclusively determined. We find no merit in the procedural aspect of the Respondent's argument because nothing precluded the Respondent from raising this issue in the representation proceedings. In addition, the substantive aspect of its argument is without merit for the reasons set forth in fn. 1.

In addition, the Respondent's answer specifically denies pars. 6(b) and 7 of the complaint, which allege that the Union was certified as the exclusive collective-bargaining representative of the nutrition department employees of the Respondent's Lacey and Tumwater, Washington stores and sets forth the appropriate unit. As discussed in fn. 4, *infra*, the corrected certification of representative that issued on May 7, 2009, certified that the Union may bargain for the voting group of employees as part of the existing unit of employees that it currently represents. The corrected certification is attached to the General Counsel's motion as Exh. H and the Respondent does not contest the authenticity of this document. Further, the unit issue was litigated and resolved in the underlying representation proceeding. Accordingly, the Respondent's denials with respect to these allegations do not raise any litigable issues in this proceeding. See *Alta Vista Regional Hospital*, 352 NLRB 809, 809 fn. 3 (2008).

the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.³

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a State of Ohio corporation with offices and places of business in Lacey and Tumwater, Washington, is engaged in the retail grocery business.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its facilities goods valued in excess of \$50,000 directly from points outside the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed in the [Respondent's] present and future grocery stores, . . . located in Mason-Thurston Counties, State of Washington, . . . excluding employees whose work is performed within a meat, culinary, prescription or bakery production department

location of the retail establishment, [and] supervisory employees within the meaning of the Labor Management Relations Act of 1947 as amended.

Since at least 2001, and at all material times, based on Section 9(a) of the Act, the Union has been the designated exclusive collective-bargaining representative of the unit and, since then, has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 6, 2007, to May 1, 2010.

On April 24, 2009,⁴ in Case 19-RC-15036, a majority of all regular full-time and part-time employees, clerks, and assistant managers working in the nutrition department of the Respondent's Lacey and Tumwater, Washington retail stores, in a self-determination election, designated and selected the Union as their representative for the purposes of collective bargaining with the Respondent, to be included in the unit.

On May 7, 2009, in Case 19-RC-15036, the Regional Director issued a corrected certification of representative, certifying that the Union may bargain for the voting group of nutrition department employees described above as part of the unit of employees that it currently represents.⁵

The following employees of the Respondent (the expanded unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed in [the] Respondent's present and future grocery stores, . . . located in Mason-Thurston Counties, State of Washington, and all regular full-time and part-time employees, clerks, and assistant managers working in the nutrition department of the Respondent's Lacey and Tumwater, Washington, retail stores; excluding Nutrition Department Managers of the Lacey and Tumwater, Washington, retail stores, employees whose work is performed within a meat, cu-

³ The Respondent's request to dismiss the complaint, its request for a hearing before an administrative law judge, and its request for oral argument are therefore denied.

Member Schaumber concurred in denying the Respondent's request for review in the underlying preelection representation proceeding (unpublished order dated April 21, 2009). In so doing, he recognized that although he dissented in *Umass Memorial Medical Center*, 349 NLRB 369 (2007), that case is extant law. Member Schaumber remains of the view he expressed in *Umass Memorial Medical Center*. Nevertheless, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Member Schaumber agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

⁴ Although the complaint at par. 6 alleges that the nutrition department employees selected the Union as their bargaining representative about April 29, 2009, the General Counsel's motion, and the tally of ballots attached as Exh. G to the motion, indicate that the date of the self-determination election was April 24, 2009.

⁵ Although the complaint alleges that the corrected certification, issued on May 7, 2009, certified the Union as the exclusive collective-bargaining representative of the voting group of nutrition department employees, this is an incorrect statement of the results of the election. The representation proceeding involved a self-determination election among the voting group and the corrected certification simply certified that the Union may bargain for the employees in the voting group as part of the unit of employees it currently represents. See *Winkie Mfg. Co.*, 338 NLRB 787, 787 fn. 2 (2003), aff'd. 348 F.3d 254 (7th Cir. 2003).

linery, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the Labor Management Relations Act of 1947 as amended.

The Union continues to be the exclusive collective-bargaining representative of the unit employees in the expanded unit under Section 9(a) of the Act.

B. Refusal to Bargain

About June 8, 2009, the Union requested, in writing, that the Respondent bargain with it as the exclusive collective-bargaining representative of the nutrition department employees of its Lacey and Tumwater, Washington retail stores. About June 26, 2009, the Respondent, in writing, informed the Union that it would not bargain with it as the exclusive collective-bargaining representative of the nutrition department employees of its Lacey and Tumwater, Washington retail stores. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 26, 2009, to bargain with the Union as the exclusive collective-bargaining representative of the nutrition department employees of its Lacey and Tumwater, Washington retail stores, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Fred Meyer Stores, Inc., Lacey and Tumwater, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union, as the exclusive collective-bargaining representative of the employees employed by the Respondent in the nutrition department of its Lacey and Tumwater, Washington retail stores.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees employed by the Respondent in the nutrition department of its Lacey and Tumwater, Washington stores as part of the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All employees employed in [the] Respondent's present and future grocery stores, . . . located in Mason-Thurston Counties, State of Washington, and all regular full-time and part-time employees, clerks, and assistant managers working in the nutrition department of the Respondent's Lacey and Tumwater, Washington, retail stores; excluding Nutrition Department Managers of the Lacey and Tumwater, Washington, retail stores, employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the Labor Management Relations Act of 1947 as amended.

(b) Within 14 days after service by the Region, post at its facilities in Lacey and Tumwater, Washington, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 2009.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 4, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with United Food and Commercial Workers Local 367, affiliated with United Food and Commercial Workers International Union, as the exclusive collective-bargaining representative of our employees in the nutrition department of our Lacey and Tumwater, Washington, retail stores.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the nutrition department of our Lacey and Tumwater, Washington, retail stores as part of the following bargaining unit:

All employees employed in our present and future grocery stores, . . . located in Mason-Thurston Counties, State of Washington, and all regular full-time and part-time employees, clerks, and assistant managers working in the nutrition department of our Lacey and Tumwater, Washington, retail stores; excluding Nutrition Department Managers of the Lacey and Tumwater, Washington, retail stores, employees whose work is performed within a meat, culinary, prescription or bakery production department location of the retail establishment, [and] supervisory employees within the meaning of the Labor Management Relations Act of 1947 as amended.

FRED MEYER STORES, INC.